Liability in the Capacity of Property Owner.

§ 985 (780). **Liability as Property Owner.** — Upon similar grounds, municipal corporations *are liable for the improper management and use of their property*,[1] to the same extent and in the same manner as private corporations and natural persons.[1] Unless acting under some valid special legislative authority, they must, like individuals, use their own so as not to injure that which belongs to another, or unjustly or improperly invade private rights. Thus they may erect a building for corporate purposes, but if in so doing they should place its foundations in such a manner as to cause water to flow back on private owners, the latter would have their action for the damage, the same as if the injury had been caused by an individual.[2] Similarly, a municipal corporation, *with control of*

the work, stand in the relation of agents deputed by *the city* to perform this duty." They hold that the city, by voluntarily accepting the benefits of the acts, by approving the plan of the commissioners, and by instructing them to proceed with the execution of the work, adopted and constituted the commissioners the *agents of the city;* and therefore, on the principle of *respondeat superior*, it was liable for *their* neglect and want of skill in the erection of the dam. In the Court of Errors (2 Denio, above cited), Chancellor *Walworth* doubted this basis of the defendant's liability, and said: "It is upon the ground that the dam was the property of the city corporation, and that such corporation was legally bound to see that its corporate property was not used by any one so as to become noxious to the occupiers on the river below, that the judgment [of the Supreme Court] in the case must be sustained, if it can be sustained at all. And upon that ground, though, I confess, with some hesitation, I shall assent to the affirmance of the judgment of the court below." It was affirmed by nineteen members against four; but as the most of them delivered no opinions, the exact grounds of the affirmance cannot be known. We do not doubt that Chancellor *Walworth's* position is sound, and it seems to us equally clear that the view of the Supreme Court, that the water commissioners became the agents of the city by adoption, is correct. On both grounds the liability of the city was indubitable, and would now (1890) not be seriously questioned anywhere. *Denio*, C. J., in Darlington *v.* New York, 31 N. Y. 164, 200, speaking of Bailey *v.* The Mayor, says that the Court of Errors substantially repudiated the view of the Supreme Court, which affirmed the enterprise of furnishing the city with water to be a *private* work, as distinguished from an act of municipal government, and that the city was held liable on account of its legal personality, and its responsibility as such for the negligent acts of its agents and officers in the execution of their duties. See Fleming *v.* Susp. Bridge, 92 N. Y. 368, and the observations of *Hunt*, J., on this case, in Barnes *v.* District of Columbia, 91 U. S. 540, 552 (1875). It was followed in Aldrich *v.* Tripp, 11 R. I. 141; s. c. 23 Am. Rep. 434, noted *ante*, sec. 982, note. It is commented on by *Sargent*, J., in Wright *v.* Holbrook, 52 N. H. 120 (1872); s. c. 13 Am. Rep. 12; *supra*, sec. 974, note.

In Philadelphia *v.* Collins, 68 Pa. St. 106 (1871), the city was held liable in damages to the owner of a boat for *wrongfully*, during a severe drought, *withdrawing water from the Schuylkill* to supply the Fairmount Waterworks, to such an extent as to prevent boats from navigating the river.

There is *no liability* on part of the city as owner of the Croton Aqueduct for injuries from defects in the *lateral service pipes* inserted by consumers of water into the mains. Terry *v.* New York, 8 Bosw. 594; Treadwell *v.* New York, 1 Daly (N. Y.), 123. See Cowley *v.* Sunderland, 6 H. & N. 565 (noticed *supra*, sec. 983, note), as to the liability of a municipal corporation for injuries caused by the unsafe condition of its property. Commissioners were appointed *to build a city hall* according to certain plans, with power to employ agents and make contracts. By one of the contracts they were to furnish, at the site of the building, centres for brick arches. They put the centres in place, and one of them, being insecurely fixed, fell and killed a laborer. The city was held liable. McCaughey *v.* Providence, 12 R. I. 449; *infra*, sec. 985, 985 *a*.

[1] See *ante*, ch. xv. on Corporate Property; Cowley *v.* Sunderland Bor., 6 H. & N. 565, noted *supra*, sec. 983, note; Moulton *v.* Scarborough, 71 Me. 267, (injury by animal on poor farm); Hannon *v.* St. Louis County, 62 Mo. 313 (county

laying water-pipes on its own property), noted *infra*, sec. 986; Brown *v.* Atlanta, 66 Ga. 71, where it was held that in suits for damages caused by the overflow from city water-works the law is the same as in case of damages from mill-dams. See also Millers *v.* Augusta, 63 Ga. 772. Even under the restricted view of the liability of municipal corporations which prevails in *Massachusetts*, it is admitted that "where *a city holds and deals with property as its own*, not in the discharge of a public duty, nor for the direct and immediate use of the public, but for its own benefit, by receiving rents or otherwise, in the same way as a private owner might, it is liable, to the same extent as he would be, for negligence in the management or use of such property to the injury of others. Thayer *v.* Boston, 19 Pick. (Mass.) 511; Oliver *v.* Worcester, 102 Mass. 489. The distinction between acts done by a city in discharge of a public duty, and acts done for what has been called, by way of distinction, its private advantage or emolument, has been clearly pointed out by three eminent judges, while sitting in the supreme courts of their respective States, who have since acquired a wider reputation in the Supreme Court of the Union, and by the late Chief Justice of England. *Nelson*, C. J., in Bailey *v.* New York, 3 Hill (N. Y.), 531, 539; *Strong*, J., in Western Sav. Fund Soc. *v.* Philadelphia, 31 Pa. St. 185, 189." *Per Gray*, C. J., in Hill *v.* Boston, 122 Mass. 344, 359 (1877); *supra*, secs. 965, 974 *a*, 983; *ante*, sec. 66, and cases there cited; *post*, sec. 986.

[1] Worden *v.* New Bedford, 131 Mass. 23; Perkins *v.* Lawrence, 136 Mass. 305; Waldron *v.* Haverhill, 10 N. E. Rep. 481; Mackey *v.* Vicksburg, 64 Miss. 777 (injury to child caused by falling into an excavation made by the city on private property under its control); Carrington *v.* St. Louis, 89 Mo. 208 (accident in police station); Rowland *v.* Kalamazoo, 49 Mich. 553.

[2] Eastman *v.* Meredith, 36 N. H. 296, *per Perley*, C. J. Text cited and approved. Cumberland *v.* Willison, 50 Md. 138. Bailey *v.* New York, 3 Hill (N. Y.), 531, 541, *per Nelson*, C. J.; Thayer *v.* Boston, 19 Pick. (Mass.) 511; Rhodes *v.* Cleveland, 10 Ohio, 159; Lacour *v.* New York, 3 Duer (N. Y.), 406 (1854); Brower *v.* New York, 3 Barb. (N. Y.) 254 (1848); Treadwell *v.* New York, 1 Daly (N. Y.), 123; Rochester White Lead Company *v.* Rochester, 3 N. Y. 463; Harper *v.* Milwaukee, 30 Wis. 365 (1872). In Weet *v.* Brockport, 16 N. Y. 161, 172, Mr. Justice *Selden*, referring to Rochester White Lead Company *v.* Rochester, just cited, says: "The recovery rested upon the obvious principle that a municipal corporation is no more exempt from liability in case it creates a nuisance, either public or private, than an individual." *Post*, secs. 1038–1052. So on the principle in the text *where a municipal corporation, to supply itself with water*, purchased land from the plaintiff, and built thereon a reservoir, from which water percolated through the soil and injured the plaintiff's adjoining lands, the corporation is liable for the damages. Wilson *v.* New Bedford, 108 Mass. 26; s. c. 11 Am. Rep. 352. So also where a town has power *to erect a market-house* it must manage and maintain it in a proper manner and with a just regard to the rights of the owners of the adjacent property. Suffolk *v.* Parker, 79 Va. 660.

Nuisances, and power of municipal corporation to prevent and abate. See *ante*,

a public common, traversed by foot-paths on which the public may rightfully travel, is liable to a common-law action for damages caused by a *dangerous and unguarded excavation made by the corporation for its own purposes* in the ground adjoining one of the paths, to a person walking thereon, and who was at the time using due care.[1] So in a case in which it appeared that a city corporation was the owner of a *market-house*, the stalls of which it rented, but in front of which there was a pavement or open passage, which it seems was under the control of the city and not of its lessees; in the pavement there was a *dangerous hole in front of one of the stalls*, into which the plaintiff, while attending the market, fell and was injured. The court considered the market-house to be the private property of the corporation, that it was its duty to keep it in a safe condition, and that it was liable for any injury happening to individuals in consequence of its neglect to perform this duty.[2]

§ 985 *a*. **Same subject. Impure Water in free Public Well in Street.** — The doctrine of the preceding section does not extend so far as to make a city liable for sickness or death caused *by drinking impure water from a free public well*, established and maintained by its authority *in one of the streets*, and in which it had placed a pump for public use, the impurity being the result of contamination from the soil through which the water percolated, and the city having no

secs. 374, 378; *post*, secs. 661, 921; People *v.* Albany, 11 Wend. 539 (no power to destroy a work [a bulkhead] *authorized by law*, because injurious to the public health); Hart *v.* Albany, 9 Wend. 571, affirming s. c. 3 Paige (N. Y.), 213; Denning *v.* Roome, 6 Wend. 651; Wetmore *v.* Tracy, 14 Wend. 250; Rochester *v.* Collins, 12 Barb. 559 (1850); Ray *v.* Lynes (blacksmith shop), 10 Ala. 63 (1846). A municipal corporation is not liable as for misfeasance in extending the bounds of one of its streets by widening it, thereby bringing an existing nuisance within the street limits. Larkin *v.* Saginaw Co., 11 Mich. 88; Pontiac *v.* Carter, 32 Mich. 164; Detroit *v.* Beekman, 34 Mich. 125; Lansing *v.* Toolan, 37 Mich. 152. Index, tit. *Nuisances*.

[1] Oliver *v.* Worcester, 102 Mass. 489, 499 (1869); s. c. 3 Am. Rep. 485. The principle is tersely stated by *Hoar*, J., *Ib.* 496; and the authorities cited by *Gray*, J., *Ib.* 499. It was considered to be an act done by the city in its *private, as distinguished from its public character*. Worden *v.* New Bedford, 131 Mass. 23; *post*, sec. 1024, note; sec. 1034, note.

[2] Savannah *v.* Cullens, 38 Ga. 334 (1868); *supra*, sec. 981, and note; *post*, secs. 1024, 1034, and notes. A passageway from a sidewalk in a city into the basement of a building was protected by a *removable iron grating*, covered with boards, the iron-work being fitted to the opening in such a way that it could not be left in an insecure condition, except by gross carelessness. After being in this condition for forty years, during which time it had never been known to be left out of its place, the passageway was used by a stranger, who did not replace the grating properly; and *a few minutes* after the plaintiff, who was passing on the sidewalk, stepped upon it, and it gave way, and she was injured. It was held that the city was not, under the circumstances, liable. Littlefield *v.* Norwich, 40 Conn. 406 (1873); Shearm. & Red. Neg. (4th ed.) sec. 369.

notice of its condition. No liability in such case arises upon the theory that the city has, by its acts, invited the public to use the water, and, for that reason, is bound to know its quality, and to assure its wholesomeness while it maintains the pump.[1] Whether the city would have been liable on the *ground of negligence* if it had known of the unwholesomeness of the water and had taken no measures to prevent its use by the public was not decided; but the liability of the city in such a case on the ground that it created and maintained a public nuisance would not, as it seems to us, be at all doubtful.

§ 986. **Liability as Property Owner for Negligence.** — Where the *county* of St. Louis, having, originally without any legislative authority, *purchased property and erected thereon a county insane asylum* (which was afterwards recognized by the legislature as an asylum for the county), with a view to supply the building with water, dug on its grounds a deep trench, the sides of which, in consequence of negligently omitting properly to support them, fell in and injured one of the workmen, it was held liable for the injury, although there was no statute making counties responsible for the neglect or wrongful acts of its officers or agents.[2]

Other *illustrations of municipal liability*, on the general ground stated in the three preceding sections, are given in the note.[3]

[1] Danaher *v.* Brooklyn, 51 Hun, 563. This novel case (since affirmed) also decided that the uncommunicated knowledge of the health department of the city of Brooklyn was not imputable to the city, and the case was distinguished from those cases in which a city is held liable for nuisances and injuries to private property as a direct result of defective sewers, as in Seifert *v.* Brooklyn, 101 N. Y. 136 (*post*, secs. 1046–1051), and from those in which it owns water-works and supplies water for pay, as in Milnes *v.* Huddersfield; L. R. 10 Q. B. Div. 124. *Ante*, secs. 981, 982, 983, note, 985, note.

[2] Hannon *v.* St. Louis County, 62 Mo. 313 (1876). The question arose on a demurrer to the complaint based on the ground that "a county is a political subdivision of the State, and not a body corporate either private or municipal, and therefore not liable for the *laches* or misconduct of its servants or employees," unless there is a statute creating such liability. The court held the county liable, regarding the case as within the principle of Bailey *v.* New York, 3 Hill (N. Y.), 531, 2 Denio, 433, and the doctrine of Bigelow *v.* Randolph, 14 Gray, 541, the county having (with legislative permission, but not in consequence of a legislative command) voluntarily assumed a special duty or undertaking. The case is peculiar, and on the whole, perhaps, rightly decided, the main doubt which exists being one which arises from the character of the undertaking or duty assumed, viz., the care of the insane, which in its nature is rather public than municipal or local. See Perkins *v.* Lawrence, 136 Mass. 305; *ante*, sec. 963, and note.

[3] *Post*, secs. 1024, 1034, and notes. "If a city or town," says Chief Justice *Gray* (Hill *v.* Boston, 122 Mass. 344, 358, 1877), "negligently constructs or maintains the *bridges or culverts in a highway across a navigable river or a natural water-course, so as to cause the water to flow back upon and injure the land of another*, it is liable to an action of tort, to the same

Consequential Damages from Public Improvements.

§ 987 (781). **Not liable for Consequential Damages of Authorized Acts.** — The rule is well settled, and has, as we shall see in the course of the present chapter, very extensive application to the acts of municipal corporations, viz., that such a corporation, when it confines itself *within the limits of its power and jurisdiction, is not liable to an action for consequential damages* to private property or persons (unless it be given by special constitutional provision or by statute), where the act complained of was done by it or its officers *under and pursuant to authority conferred by a valid act of the legislature*, and there has been no want of reasonable care or want of reasonable skill in the execution of the power, although the same act, if done without legislative sanction, would be actionable.[1]

[1] Callender *v.* Marsh, 1 Pick. (Mass.) 418 (1823); No. Transp. Co. *v.* Chicago, 99 U. S. 635, noted *infra*, sec. 995; Radcliff's Ex. *v.* Brooklyn, 4 N. Y. 195; Bellinger *v.* N. Y. Central R. R. Co., 23 N. Y. 42; Pontiac *v.* Carter, 32 Mich. 164; Detroit *v.* Beckman, 34 Mich. 125; s. c. 22 Am. Rep. 507; Cumberland *v.* Willison, 50 Md. 138, citing and approving text; Rounds *v.* Mumford, 2 R. I. 154 (1852); Sprague *v.* Worcester, 13 Gray, 193 (1859); Bennett *v.* New Orleans, 14 La. An. 120 (1849); Americus *v.* Eldridge, 64 Ga. 524; Rigney *v.* Chicago, 102 Ill. 64; Snyder *v.* Rockport, 6 Ind. 237 (1855); *supra*, sec. 968; Perry *v.* Worcester, 6 Gray, 544; Flagg *v.* Worcester, 13 Gray, 601, 605 (1859), *per Merrick*, J.; British Cast Plate Co. *v.* Meredith, 4 D. & E. T. R. 794; Whitehouse *v.* Fellowes, 10 C. B. (N. S.) 779; Mersey Docks Cases, 11 H. of L. C., 713, 714 (1866) (noted *supra*, sec. 983, note), *per Blackburn*, J., who, speaking of this subject, says: "If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful. . . . But though the legislature has authorized the execution of the works, it does not thereby exempt those authorized to make them from *the obligation to use reasonable care* that, in making them, no unnecessary damage shall be done." The distinction is between damage resulting from authorized works, where the legislative authority is a bar to an action unless given by statute, and damage by reason of the work being negligently done, as to which the remedy of the party injured by action remains. Geddis *v.* Bann Reservoir, L. R. 3 App. Cases, 455, *per Blackburn*, J.; Brine *v.* Gt. Western Ry. Co., 110 Eng. C. L. (2 Best & S.) 402, 411 (1862), *per Crompton*, J.; Shearm. & Red. Neg. (4th ed.) sec. 283, collects many of the cases on this subject; 2 Thomps. Neg. 743, and cases. *Ante*, sec. 685. See, also, Hicks *v.* Dorn, 42 N. Y. 47 (1870); *post*, secs. 995, 1038-1052; *ante*, sec. 657.

The subject of injuries arising from the negligent execution of statutory powers is treated in chap. xvi. of Addison on Torts, pp. 725, 727, where the following observations of *Watson*, B., are quoted: "Powers given by statute are not to be used to the peril of the lives or limbs of the queen's subjects. They are to be exercised reasonably, and with due care, so as not by negligence to cause dangers to others." Manley *v.* St. Helen's Canal & Ry. Co. (canal-bridge over highway), 2 H. & N. 840; Scott *v.* Manchester, 2 H. & N. 204. A city, celebrating a holiday under authority of a general statute, held not liable for personal injuries resulting from the *negligent discharge of fireworks* by its servants. Tindley *v.* Salem, 137 Mass. 171 (noted *ante*, sec. 968); *infra*, secs. 995 *a*–995 *c*, 1049–1052. There is a civil liability for injuries to adjoining property arising from a railroad company not using proper caution in making openings in embankment authorized by statute. Lawrence *v.* Great Northern Ry. Co., 16 Q. B. 643, 653; Add. on Torts (4th Eng. ed.) 737, and cases cited. The same principle asserted by the Supreme Court of *Missouri*. McCormick *v.* Kan. City, St. J. & C. B. R. R. Co., 57 Mo. 433 (1874). *Wagner*, J., *Ib.* p. 437, seems to admit that a less stringent rule applies to municipal corporations in repairing streets. A city is not liable for damages done to real estate by the occupation of the street upon which it fronts, for a railroad, with its per-

extent that any corporation or individual would be liable for doing similar acts. Anthony *v.* Adams, 1 Met. (Mass.) 284, 285; Lawrence *v.* Fairhaven, 5 Gray, 110; Perry *v.* Worcester, 6 Gray, 544; Parker *v.* Lowell, 11 Gray, 353; Wheeler *v.* Worcester, 10 Allen (Mass.), 591; *post*, sec. 1038. So if a city, by its agents, without authority of law, *makes or empties a common sewer upon the property of another to his injury*, it is liable to him in an action of tort. Merrimac River Canal Prop. *v.* Lowell, 7 Gray, 223; Hildreth *v.* Lowell, 11 Gray, 345; Haskell *v.* New Bedford, 108 Mass. 208; 2 Thomps. Neg. 751, and cases; *post*, sec. 1046. But in some cases, the cause of action is not neglect in the performance of a corporate duty, rendering a public work unfit for the purposes for which it is intended, but it is the doing of a wrongful act, causing a direct injury to the property of another, outside the limits of the public work." Child *v.* Boston, 4 Allen, 41; Emery *v.* Lowell, 104 Mass. 13; Merrifield *v.* Worcester, 110 Mass. 216.

The implied liability of a city in *Massachusetts* for injuries to *private property*, caused by neglect in the *construction or repair of sewers*, is declared to rest upon the ground that the sewers, when built under permissive authority from the legislature, became the property of the city. Hill *v.* Boston, *supra; infra*, sec. 1049. The learned judge in Hill *v.* Boston, thus refers to some recent English cases, which are regarded by him as based upon the same principle: —

"An action was brought against a local board of health by a *person injured by treading upon a grating in the highway*, which had been put there to drain the water into a *common sewer*. White *v.* Hindley L. B. of H., L. R. 10 Q. B. 219. [Noted *supra*, sec. 981, note.] *Blackburn*, J., referred to Gibson *v.* Preston and Parsons *v.* St. Matthew's Vestry as establishing that the defendants would not be liable for non-repair of the highway; and they were held liable only as *owners of the sewer*, of which the court considered the grating to be a part, and which had been left in a dangerous condition for six months. The case was thus brought within the rule which governed the decisions in *Massachusetts*. Child *v.* Boston, 4 Allen, 41; Emery *v.* Lowell, 104 Mass. 13." Further as to sewers and drains, *post*, secs. 980, 1049–1052; Shearm. & Red. Neg. (4th ed.) sec. 287, and cases; 2 Thomps. Neg. 750, and cases.

"In another case the action was against the trustees of a turnpike road, for so negligently constructing and keeping *catchpits by the side of the road*, and cutting outlets into the adjoining land, that the water, thereby collected and poured off, flowed into and drowned the plaintiff's colliery. Whitehouse *v.* Fellowes, 10 C. B. (N. S.) 765. So where a public board authorized to construct sewers, but which in excess of its authority had made an obstruction which was a public nuisance in the bed of a navigable river, was held liable to one whose vessel suffered injury thereby. Brownlow *v.* Metrop. Bd. of Works, 13 C. B. (N. S.) 768, and 16 C. B. (N. S.) 546. These cases fall within the principles established in *Massachusetts* (Haskell *v.* New Bedford, 108 Mass. 208, and similar decisions; S. P. Cumberland *v.* Willison, 50 Md. 138), in which, by a wrongful act, a direct injury was done to the plaintiff's property beyond the lawful limits of the public works."

Defendant city as the owner of gasworks laid down a gas main which, by reason of the rotting of a wooden plug, permitted the gas to escape into the municipal sewer. The gas found its way through this sewer into a drain connected with the plaintiff's house, in which it accumulated in great quantities, and finally exploded from ignition at the kitchen range. It was held that the city would be liable if its authorities had notice of the defect in the sewer or gas main, or might have discovered the defect by the exercise of proper and reasonable diligence. Kibele *v.* Philadelphia, 105 Pa. St. 41 (1884).

§ 988. **Same subject.** — This *general principle is well illustrated* by an important case in Wisconsin against the city of Milwaukee, in which the plaintiff sought to recover damages sustained by reason of a *harbor improvement made by the city under special authority from the legislature.* There was no allegation that the damages were the result of negligence or want of care in making the improvement; but the recovery was sought because the effect of the improvement was to allow the waters of the lake to be driven by the wind through the canal or channel thus artificially made by the city into and upon the lots of the plaintiff in the vicinity, causing them to be washed away and rendered insecure and unfit for use. But the

mission, unless the damages are such as would not have resulted if the road had been properly constructed and operated. Emerson *v.* Lexington, 69 Mo. 157; Woodruff *v.* No. Bloomfield Gravel Co., 16 Fed. Rep. 25; Jennison *v.* Kirk, 98 U. S. 461; Cooley Const. Lim. (4 ed.) 253. See, further, *post*, secs. 991, 995 *a*–995 *c*, 1038–1052.

Where a municipal corporation possesses *the legal authority* to do an act, it is immaterial to *inquire into its motives* for doing it, and erroneous to make its liability depend upon the motives with which the act was done. Benjamin *v.* Wheeler, 8 Gray, 409 (1857); Philadelphia *v.* Randolph, 4 Watts & S. (Pa.) 514 (1842) (stopping watercourse); Chatfield *v.* Wilson, 28 Vt. 49; s. c. 5 Am. L. Reg. (o. s.) 528; *infra*, sec. 990, note; 2 Thomps. Neg. 739, 1265; Montgomery Council *v.* Gilmer, 33 Ala. 116 (1858).

It was held that a *contractor under the State, in the execution of the work of enlarging a canal belonging to the State*, cannot justify the commission of trespasses upon private property. It was also held that the casting of stone and earth, as the result of a blast, from the bed of the canal upon the lands of an adjoining proprietor, where the plaintiff was lawfully at work, and which in falling injured him, was a trespass for which the contractor was liable; and it seems to have been the opinion of the learned judge who gave the judgment of the court that he was liable, although the blasting was done without negligence on his part. On this last point, *Folger*, J., after commenting on several previous cases decided in *New York*, says: "It follows, then, that the defendant [the contractor], having no right to invade the [adjoining] premises, which, for the purposes of this case, were the possession of the plaintiff, it matters not whether or not he [the defendant] made his invasion without negligence." Upon the facts found by the referee, the question of the defendant's liability, irrespective of negligence for the personal injury to the plaintiff, did not, it seems, necessarily arise. St. Peter *v.* Denison, 58 N. Y. 416 (1874), distinguishing Radcliff's Ex. *v.* Brooklyn, 4 N. Y. 195.

Questions as to *liability for damages caused by or incident to acts and undertakings authorized by statute* are often of great and confessed difficulty. In England the general rule is that no action impliedly lies for doing what Parliament has authorized. But the courts have frequently implied a condition that such authorized acts must be done without negligence, and with judgment and caution, or the doer will be liable. See Pollock on Torts, 110–115. The same general principles apply, of course, in this country, with the limitation that here the legislature cannot authorize acts which would otherwise be lawful, if thereby any constitutional provision is infringed. In applying the qualification to the general rule that unless the power be exercised with judgment and caution an action will lie, great care must be used where the authorized works and undertakings are not for profit or gain, but are constructed by incorporated or municipal bodies for the public good or convenience. *Post*, secs. 995 *a*–995 *c*.

court decided (applying the principle above stated) that the plaintiff's action could not be maintained.[1]

§ 989 (782). **Consequential Damages; Grades and Change of Grades in Streets.** — In connection with the principle just mentioned that there is no implied or common-law liability for doing with proper care an act which is either directed or authorized by a valid statute, may be noticed the power of municipal corporations *to grade and to change the established grade or level of their streets*, though the exercise of the power may be injurious to the adjoining property owners.[2] The public nature of streets; the uses to which

[1] Alexander *v.* Milwaukee, 16 Wis. 247 (1862). Cited and distinguished, Pettigrew *v.* Evansville (surface water), 25 Wis. 223; *ante*, sec. 658, note; *post*, secs. 995, 1039–1040.

Referring to Alexander *v.* Milwaukee, *supra*, the Supreme Court of the United States observes that it has been frequently held by the Supreme Court of *Wisconsin* and elsewhere, that overflowing land by backing water upon it was a "taking" of private property within the meaning of the constitutional provision (*post*, sec. 991, and note), and that "it is difficult to reconcile" Alexander *v.* Milwaukee with the decisions above referred to. Pumpelly *v.* Green Bay Co., 13 Wall. 166, 180. Undoubtedly the principle on which the court placed Alexander *v.* Milwaukee is a sound one; the doubt in the case is whether the plaintiff's land was not "taken" in such a sense as to give him a constitutional right to compensation. See *post*, secs. 990, note, 991, and note, 995; Ashley *v.* Port Huron, 35 Mich. 296 (1877); s. c. 24 Am. Rep. 552, and note of Mr. Thompson; Northern Transp. Co. of O. *v.* Chicago, 99 U. S. 635 (1878); noted *infra*, sec. 995; 2 Thomps. Neg. 692, 743; Shearm. & Red. Neg. sec. 283. What is a "taking" of private property, is elsewhere discussed in the present work. See *post*, secs. 995 *a*–995 *c*; also Index, tit. *Eminent Domain*. Where a city owned the bed of a river and had the right to divert and sell water to its citizens, it was held not to be liable for damages to private property caused by a sudden and unlooked for flood. Moore *v.* Los Angeles, 72 Cal. 287.

[2] *Ante*, secs. 987, 988. *Infra*, secs. 990, and cases, 995–995 *c*. "The objects to be accomplished by grades are twofold; (1) draft, and (2) drainage." *Per Champlin*, J., in Larned *v.* Briscoe, 62 Mich. 393 (1886); Fuller *v.* Atlanta, 66 Ga. 80; 2 Thomps. Neg. 747, and cases. In *Iowa*, by statute, owners of improved property are entitled to damages for changes of grade. Hempstead *v.* Des Moines, 52 Iowa, 303; Meyer *v.* Burlington, 52 Iowa, 560; Conklin *v.* Keokuk, 73 Iowa, 343; *post*, sec. 990, note. Where a *statute* makes a city liable to adjoining property owners for damages caused by a change of grade, *its repeal* will not take away their right to damages for a change ordered while it was in force. Healey *v.* New Haven, 49 Conn. 394; *post*, sec. 990, note. Text quoted and approved in Methodist Episc. Ch. *v.* Wyandotte, 31 Kan. 721. See, also, Heiser *v.* New York, 104 N. Y. 68; Healey *v.* New Haven, 47 Conn. 305. In Gray *v.* Knoxville, 85 Tenn. 99, a city was held liable for damages caused by grading a street, in doing which plaintiff's fences were destroyed and his land overflowed by surface water, on the ground that the act was a "taking" of private property for public use; *post*, secs. 995–995 *c*. Lowering the face of the street a few inches to improve its capacity, without changing the level of the curb, is not such a change of grade as will entitle abutting lot-owners to damages. Coates *v.* Dubuque, 68 Iowa, 550. A city, as against the owner of the fee in the street, held not empowered to authorize its contractor for grading streets to remove and sell stone, the removal of which was not necessary for the grading and improvement of the street. Rich *v.* Minneapolis, 37 Minn. 423. *Ante*, sec. 689.

they may lawfully be put; the authority of the legislature over them; the nature of the rights of the adjacent proprietors, of the municipality, and of the public with respect thereto; and of the delegated authority of municipal bodies or officers to improve and graduate them, — are topics which have been considered in a former chapter.[1] In view of the nature of streets as there explained, and of that control over them which of right belongs to the State,[2] and of the nature of the ownership of lots bounded thereon, which implies subjection, if not consent, to the exercise and determination of the public will respecting what grades or changes in the grades thereof shall, from time to time, be found necessary, and what other improvements thereon or therein (within the legitimate purposes of streets[3]) shall be found expedient, it results, we think, that adjoining property owners are not entitled, of *legal right*, without constitutional or statutory aid, to compensation for damages which result as *an incident or consequence* of the exercise of this power by the State, or the municipality by delegation from the State.

§ 990 (783). **No common-law Liability for Consequential Damages for Change of Grade.** — Accordingly, the courts, by numerous decisions in most of the States, have settled the doctrine that municipal corporations, acting under authority conferred by the legislature to *make and repair, or to grade, level, and improve streets*, if they keep within the limits of the street, and do not trespass upon or invade private property, and exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner, whose lands are not actually taken, trespassed upon, or invaded, for *consequential damages* to his premises, unless there is a provision in the Constitution of the State, in the charter of the corporation, or in some statute, creating the liability.[4] There is no such implied or common-law liability, even though in grading and levelling the street a portion of the adjoining lot, in consequence of the removal of its natural support falls into the highway.[5] And

[1] Chap. xviii. on Streets, *ante*, sec. 654 *et seq.* The power to grade is a *continuing* one. *Ante*, sec. 686. "As the *duty* of keeping the street in repair *is a continuing one*, so is the *power* necessary to perform it." *Per Grier*, J.; Smith *v.* Washington, 20 How. U. S. 135, 148 (1857).

"*Grading*," as applied to streets, means their "reduction to a certain degree of ascent or descent." *Ib.*, per *Grier*, J. *Ante*, secs. 685, 780, note, 797.

[2] *Ante*, sec. 656 *et seq.*

[3] What are such purposes. *Ante*, sec. 680 *et seq.*

[4] Broadwell *v.* Kansas City, 75 Mo. 213, approving text. *Post*, sec. 995; Smith *v.* Alexandria, 33 Gratt. 208; Wallich *v.* Manitowoc, 57 Wis. 9.

[5] Text quoted and approved in Methodist Episc. Ch. *v.* Wyandotte, 31 Kan. 721. See, also, Moore *v.* Albany, 98 N. Y. 396. On the other hand if the grade of a street is changed otherwise than as authorized by law, the city will be held liable for injuries caused by it. Meinzer *v.* Racine, 68 Wis. 241; Same *v.* Same, 70 Wis. 561. As, for example, when the grade is changed without the consent of the property owners or of some proportion thereof, when this is required by statute, or without complying with other precedent or necessary statutory conditions. Crossett *v.* Janesville, 28 Wis. 420; Dore *v.* Milwaukee, 42 Wis. 108; Hill *v.* St. Louis, 59 Mo. 412; Karst *v.* Stillwater & T. F. R. R. Co., 22 Minn. 118; Lewis Em. Dom. sec. 105. *Infra*, secs. 993, 994; Lafayette *v.* Wortman, 107 Ind. 404 (1886).

[1] Callender *v.* Marsh, 1 Pick. (Mass.) 418 (1823), the leading American case on this subject, and where the question was examined by *Parker*, C. J., with characteristic ability. The ground of the doctrine is thus stated by him: "Those who purchase house-lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing population of a city may require, in order to render the passage to and from the several parts of it safe and convenient; and as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as they shall see fit. They are presumed to foresee the changes which public necessity or convenience may require." 1 Pick. 431. The doctrine of Callender *v.* Marsh, 1 Pick. (Mass.) 418 (1823), has been very generally followed, as will be seen by the cases below cited. In *Massachusetts*, Griggs *v.* Foote, 4 Allen, 195; Brown *v.* Lowell, 8 Met. (Mass.) 172; Benjamin *v.* Wheeler, 8 Gray, 409. There is now in that State a remedy by statute giving adjoining owners damages "by reason of any raising or lowering, or other act done for the purpose of repairing a highway."

Where after damages had been awarded under an accepted order for widening a street, which referred to a certain plan as showing the "several locations and the amounts of land taken from each of the owners," the *grade was changed by another order*, as shown upon a certain other "plan and profile," it was held that the change was an independent proceeding for which a land-owner was entitled to additional damages. Lane *v.* Boston, 125 Mass. 519. Compare Cambridge *v.* Middlesex Co. Comm'rs, 125 Mass. 519. *Statute construed:* Flagg *v.* Worcester, 13 Gray, 601; Snow *v.* Provincetown, 109 Mass. 123; Burr *v.* Leicester, 121 Mass. 241; Ryan *v.* Boston, 118 Mass. 248; Wilbur *v.* Taunton, 123 Mass. 522; Brady *v.* Fall River, 121 Mass. 262. In Snow *v.* Provincetown, 109 Mass. 123, and Lane *v.* Boston, 125 Mass. 519, the facts were these: The streets in question had been widened and compensation paid for such widening to the abutting owners. Afterwards the municipal authorities raised the grades of the streets. It was held that for such changes in the grades the abutting owners were entitled to compensation; that the two proceedings were entirely independent of each other; and that compensation for the changes in grades was not included in that for the widening of the streets. Lewis Em. Dom. sec. 209, where the cases are digested.

An owner of abutting property is presumed to know what the established grade of the street was when he purchased and when he erected improvements, and to have built with reference to it. Denver *v.* Vernia, 8 Col. 399, where the court intimated that the city could be held liable for damages caused by its neglect to reduce a street to the established grade for a long time after it had compelled the construction of a sidewalk several feet below the original surface of the street.

the same principle applies, and the like freedom from implied liability exists, if the street be embanked or raised in reducing it to the grade line, so as to cut off or render difficult the access to the adjacent property. And this is so although the grade of the street has been before established, and the *adjoining property owner had erected buildings or made improvements with reference to such grade.*[1] But power to reduce streets to an established grade without

liability therefor does not include power to obstruct or authorize the obstruction of streets by the *approach to a bridge* in a public street,

Where the city engineer gave to a lot-owner, upon request, a grade which had not been established by the city, and the owner improved his property with reference to it, the court held that the city was not liable for damages caused by its afterwards establishing another grade. Mattingly *v.* Plymouth, 100 Ind. 545; S. P. Waller *v.* Dubuque, 69 Iowa, 541; *ante*, sec. 978; *post*, secs. 1039–1052. Text cited and approved. Fellowes *v.* New Haven, 44 Conn. 240; Kehrer *v.* Richmond, 81 Va. 745. An *injunction* held not to lie to restrain the prosecution of the grading. *Ib.*; S. P. Goszler *v.* Georgetown, 6 Wheat. 593; Detroit *v.* Beckman, 34 Mich. 125. See, generally, Cheever *v.* Shedd, 13 Blatchf. 258; Tate *v.* Missouri, 64 Mo. 149; Pontiac *v.* Carter, 32 Mich. 164; Quincy *v.* Jones, 76 Ill. 231; Dorman *v.* Jacksonville, 13 Fla. 538; Terre Haute *v.* Turner, 36 Ind. 522; Whitehouse *v.* Fellowes, 10 C. B. (N. S.) 779; Mersey Docks Cases, 11 H. L. Cas. 713; North Vernon *v.* Voegler, 103 Ind. 314; Pontiac *v.* Carter (change of grade), 32 Mich. 164.

Estoppel. Where an owner of property joined with others in a petition to change the grade of a street, it was held that he was estopped from setting up a claim for damages resulting from the grading, although he objected to the estoppel upon the ground that the petition had not been signed by the required number of property owners. Cross *v.* Kansas City, 90 Mo. 13.

In *New York:* Radcliff's Ex. *v.* Brooklyn, 4 N. Y. 195 (1850), in which the subject is discussed at length by *Bronson*, C. J., the court holds that there is no liability, both upon the ground that the damages complained of result as an incident from the exercise of legislative authority, and upon the ground (more doubtful) that the land of the street *belongs* to the corporation, and they may level or fill it at pleasure, so that they do not touch the adjoining property. Mr. Shearman gives an interesting history of the facts out of which Radcliff's Case arose. It forcibly illustrates the occasional hardship of the rule, but does not demonstrate its unsoundness in point of legal principle. Shearm. & Red. Neg. (4th ed.) sec. 283, note. See, also, in *New York*, People *v.* Green, 64 N. Y. 606 (1876); St. Peter *v.* Denison, 58 N. Y. 416 (1874); Graves *v.* Otis, 2 Hill (N. Y.), 466; Wilson *v.* New York, 1 Denio (N. Y.), 595 (1845); Benedict *v.* Goit, 3 Barb. 459; Fifth Street, *In re*, 17 Wend. 667; Mills *v.* Brooklyn, 32 N. Y. 489 (1865). See Waddell *v.* New York, 8 Barb. 95. In Clemence *v.* Auburn, 66 N. Y. 334 (1876), the principle stated in the text was held to have been erroneously applied in the court below in an action for an injury caused by a defective sidewalk. In Cogswell *v.* N. Y., N. H. & H. R. R. Co., 103 N. Y. 10, the court says of Radcliff's Case, *supra*, that it "carries to the utmost limit the right of the legislature," but it does not say that it passed those limits under the Constitution of *New York*. In 1852 New York city was made liable by statute for damages caused by change of grade. Lewis Em. Dom. sec. 213. The remedy given is exclusive. Heiser *v.* New York, 104 N. Y. 68. The right to damages accrues when the work is done. People *v.* Toll, 97 N. Y. 203. *Post*, secs. 1039, 1040.

So, also, in *Pennsylvania*, there is no implied municipal liability in street grade cases. Green *v.* Reading, 9 Watts (Pa.), 382. Approved, 20 How. (U. S.) 149; S. P. Reading *v.* Keppleman, 61 Pa. St. 233; Henry *v.* Pittsburgh & A. Br. Co., 8 Watts & S. (Pa.) 85; Charlton *v.* Allegheny, 1 Grant (Pa.) Cas. 208; Carr *v.* Northern Liberties, 35 Pa. St. 324; Ridge Street, *In re*, 29 Pa. St. 391; Kensington Comm'rs *v.* Wood, 10 Pa. St. 93. In O'Connor *v.* Pittsburgh, 18 Pa. St. 187 (1851), approved, Smith *v.* Washington, 20 How. (U. S.) 135, 149 (1859), a church had been built *according to the direction of the city regulator*, and in accordance with a *prior established grade*. Afterwards, the city authorities reduced the grade seventeen feet; the church had to be taken down and rebuilt, at an expense of $4,000. The authority given to the city was "to improve, repair, and keep in order the streets," &c. The Supreme Court of *Pennsylvania* say: "We had this case reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law, but grieve to say we can find none. The law is settled, not only in *Pennsylvania*, but by every decision in the sister States except one [*Ohio*, see *infra*]." *Gibson*, C. J., puts the decision upon the ground that as respects such matters the public corporation is the agent of the State, and partakes of the State's exemption from liability to be sued. Respecting the *Ohio* decisions, below referred to, he remarks, that though "founded on natural justice, they are not founded in the law which prevails elsewhere." In 1854, by statute, the city of Philadelphia was made liable for damages caused by a change of an established grade. Ridge Av. *Re*, 99 Pa. St. 469; Philadelphia *v.* Wright, 100 Pa. St. 235; Campbell *v.* Same, 108 Pa. St. 300; Act 1878. *Re* Brady Street, 99 Pa. St. 591, giving remedy for change of grade. The *new Constitution of Pennsylvania* of 1874 provides that "municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for the property *taken, injured, or destroyed* by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction." Construed. New Brighton Bor. *v.* U. Presbyt. Church, 96 Pa. St. 331; Pusey *v.* Allegheny, 98 Pa. St. 522; New Brighton Bor. *v.* Peirsol, 107 Pa. St. 280; Hendrick's Appeal, 103 Pa. St. 358. Compare Montgomery Council *v.* Townsend, 80 Ala. 489, decided under similar constitutional provision. Lewis Em. Dom. sec. 224; Pa. R. R. Co. *v.* Lippincott, 116 Pa. St. 472. *Post*, secs. 995 *a*–995 *c*, and notes.

So, in *Indiana:* Snyder *v.* Rockport, 6 Ind. 237 (1855), approving Radcliff's Ex. *v.* Brooklyn, *supra;* re-affirmed in Lafayette *v.* Spencer, 14 Ind. 399 (1860), where the same principle of municipal non-liability was held applicable, *under the General Municipal Corporations Act.* In support of the doctrine in the text, see Macy *v.* Indianapolis, 17 Ind. 267; Lafayette *v.* Bush, 19 Ind. 326; Vincennes *v.* Richards, 23 Ind. 381; Lafayette *v.* Fowler, 34 Ind. 140; Delphi *v.* Evans, 36 Ind. 90 (1871); Terre Haute *v.* Turner, 36 Ind. 522; Weis *v.* Madison, 75 Ind. 241. A statute of *Indiana* provides: "When the city authorities have

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[1] Stack *v.* East St. Louis, 85 Ill. 377 (1877); Pekin *v.* Brereton, 67 Ill. 477 (1873); Nevins *v.* Peoria, 41 Ill. 502; Pekin *v.* Winkel, 77 Ill. 56 (1875). These cases also hold the more doubtful proposition that if the city authorizes an independent bridge company to construct such an approach to its bridge and the bridge company constructs it, the city is liable to the abutting lot-owner for the damages which he thereby sustains. The court does not appear to rest this conclusion essentially upon the clause in the Constitution of 1870 that "private property shall not be taken or *damaged* for public use without compensation," but rather upon the ground that it is the duty of the city to keep its streets open and in repair for public use as streets, and that what it does by another it does by itself. It does not seem to us that the principle of agency is applicable. If the city has the power to authorize such an approach, it is not liable; if it has no such power, its action would not justify the nuisance, and on what principle is the city corporation to be held liable for authority attempted to be conferred by an *ultra vires* ordinance on the bridge company? But under the provision of the Constitution of 1870 quoted above, if a city constructs an elevated viaduct in streets, doing special damage to abutters, it is liable to them therefor. Rigney *v.* Chicago, 102 Ill. 64; S. P. Chicago *v.* Taylor, 125 U. S. 161 (1887); Lehigh Coal Co. *v.* Chicago, 26 Fed. Rep. 415 (1886), *per Dyer*, J. *Post*, secs. 995 *a*–995 *c*, and notes.

whereby the abutting owner's access to the street is prevented and water caused to flow and drain upon his property.[1] So the construc-